

NOTICE PUBLICATION/REGULATIONS SUBMISSION

EMERGENCY

For use by Secretary of State only

STD. 400 (REV. 01-08)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER	EMERGENCY NUMBER 2008-1010-01EON
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	
AGENCY WITH RULEMAKING AUTHORITY California Department of Corrections and Rehabilitation			AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE		TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Inmate Transfers		1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)	
2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)			
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)		ADOPT 3379 AMEND 3000, 3375, 3376 REPEAL	
TITLE(S) 15			
3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4) <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b)) <input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1) <input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input checked="" type="checkbox"/> Other (Specify) <u>Emergency Op Nec. PC 5058.3</u> <input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only			
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)			
5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective 30th day after filing with Secretary of State <input checked="" type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> §100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____			
6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) <input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal <input type="checkbox"/> Other (Specify) _____			
7. CONTACT PERSON Kelly Medina		TELEPHONE NUMBER (916) 341-7326	FAX NUMBER (Optional) (916) 341-7366
		E-MAIL ADDRESS (Optional) kelly.medina@cdcr.ca.gov	

8.

I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE

Brett H. Morgan
 TYPED NAME AND TITLE OF SIGNATORY
 Brett H. Morgan, Chief of Staff, CDCR

DATE

10/9/08

Text of Proposed Regulations

In the following text, underlining indicates adopted or amended text; and ~~strikethrough~~ indicates deleted text.

3000. Definitions.

Section 3000 is amended to alphabetically merge the definition below with those that exist in the regulations.

California Out-of-State Correctional Facility (COCF). The COCF is a program through which male CDCR inmates are transferred to out-of-state correctional facilities that have contracted with the CDCR to provide housing, security, health care and rehabilitative programming services to CDCR inmates.

3375. Classification Process

Subsection 3375(a) through 3375(g)(5)(R) remain unchanged.

Subsection 3375(g)(6) through 3375(g)(6)(B) is adopted to read:

(6) Documentation for each classification committee review for transfer to the COCF program shall include the case factors listed in 3375(g)(5) and;

(A) Attorney consultation.

(B) Conviction history.

Subsection 3375(h) through 3375(k)(2) remain unchanged.

NOTE: Authority cited: Sections 5058 and 5058.3, Penal Code.
Reference: Sections 5054 and 5068, Penal Code; *Wright v. Enomoto* (1976) 462 F.Supp. 397; *Stoneham v. Rushen* (1984) 156 Cal.App.3d 302; and *Castillo v. Alameida, et al.*, (N.D. Cal., No. C94-2847)

3376.1 Departmental Review Board

Subsection 3376.1(a) through 3376.1(d)(4) remain unchanged.

New Subsection 3376.1(d)(5) is amended to read:

(5) An out-of-state or federal prison placement is recommended by the institution classification committee for the a Western Interstate Corrections Compact

(WICC), PC Section 11190, an Interstate Corrections Compact (ICC), PC Section 11189, or a Federal Placement, PC Section 2911. A California Out-of-State Correctional Facility (COCF) transfer shall not require a DRB review or Institution Classification Committee action.

Subsection 3376.1(d)(6) through 3376.1(d)(7)(e) remain unchanged.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 5054 and 5068, Penal Code; *Sandin v. Connor* (1995) 515 U.S. 472; and *Madrid v. Gomez* (N.D.Cal. 1995) 889 F.Supp. 1146.

3379. Inmate Transfers.

Subsection 3379(a)(1) through (a)(8) are unchanged.

New Subsection 3379(a)(9) through 3379(a)(9)(I) are adopted to read:

(9) California Out-of-State Correctional Facility (COCF) Transfers. Every male inmate is potentially eligible for a COCF transfer. Every male inmate shall be reviewed for transfer eligibility to the COCF program during Reception Center processing, at initial classification committees, and at any classification committee when any temporary ineligibility for COCF transfer has been resolved. COCF transfers may occur voluntarily or involuntarily.

(A) Eligibility. At a minimum, but not limited to the following, a male inmate is eligible to be transferred to COCF if the inmate:

(1) Has remaining time to serve of no less than 6 months and no more than 30 years at the time of CSR endorsement.

(2) Is Security level I-III.

(3) Has a degree of custody established at or potentially eligible for Medium A/B or Close B Custody.

(B) Ineligibility. An inmate is ineligible if his custody designation is established at or is potentially eligible for Minimum or Close A custody.

(C) Any California inmate who volunteers or is notified that he is eligible for involuntarily transfer to COCF, shall be informed of the opportunity to seek legal consultation with an attorney:

(1) Prior to the completion of the Institutional Staff Recommendation Summary (ISRS) for Reception Center inmates.

(2) Prior to a classification committee for non-Reception Center inmates.

(3) Inmates shall have the ability to waive the attorney consultation.

(D) The notification of eligibility, and the notification of opportunity for attorney consultation and interpreter needs, shall be documented on the CDC Form 128-B (Rev 4/74), General Chrono.

(E) The information regarding the attorney consultation or waiver of such consultation by the inmate shall be documented:

(1) At the Reception Centers, on the ISRS.

(2) For all non-Reception Center inmates, on the CDC Form 128-G (Rev. 10/89), Classification Chrono.

(F) Voluntary Transfer. An inmate who is eligible for transfer to COCF and volunteers for such a transfer shall sign a CDCR Form 2169 (Rev. 8/08), Out Of State Placement Agreement. COCF inmates are not required to sign a CDC Form 294 (Rev. 6/96). Upon notification of potential involuntary transfer, inmates shall no longer be eligible for voluntary transfer.

(1) An inmate who volunteers for transfer to COCF may waive his opportunity to consult with an attorney by signing a CDCR Form 2168 (Rev. 08/08), Attorney Waiver Statement.

(2) Inmates with serious medical or dental conditions as determined by designated Health Care staff or are in the Mental Health Services Delivery System at the Enhanced Outpatient Program level of care or higher may volunteer for a COCF transfer upon executing written consent. Once the inmate has executed written consent to transfer to COCF, the inmate will be considered for transfer on a case-by-case basis by designated Health Care staff.

(G) Involuntary Transfer. Inmates with serious medical or dental conditions as determined by designated Health Care staff or who are in the Mental Health Services Delivery System at the Enhanced Outpatient Program level of care or higher are not eligible for involuntary transfer.

(H) Involuntary transfer priorities include but are not limited to the following:

(1) Inmates who have been previously deported by the federal government and are criminal aliens subject to immediate deportation; or have committed an aggravated felony as defined by federal statute 8 USC section 1101(a)(43) and are subject to deportation. Inmates in these groups are eligible for involuntary transfer when they have an active hold placed by Immigration and Customs

Enforcement (ICE) or they have been referred to ICE by CDCR for a determination of whether ICE will place an active hold on them.

(2) Inmates who are paroling outside of California.

(3) Inmates who are unassigned, and had no visit with an immediate family member as defined in Section 3000 in the past year.

(4) Inmates in any job assignment, as determined by CDCR, and had no visit with an immediate family member in the past year.

(5) Inmates who are unassigned, and visiting history will not affect a transfer decision.

(6) Inmates in any job assignment, as determined by CDCR, and visiting history will not affect a transfer.

(7) Any other inmate who is not in any of the groups above but is potentially eligible for a COCF transfer.

(I) Inmates transferred to a COCF program remain under the legal custody of the CDCR and shall be subject to the rules, rights and privileges of the CDCR in accordance with the California Code of Regulations (CCR), Division 3, Title 15.

Subsections 3379(b) through (d)(4) are unchanged.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 2911, 5025, 5054, 5068, 5080 and 11191, Penal Code; and Whitaker v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135.

INITIAL STATEMENT OF REASONS:

The California Department of Corrections and Rehabilitation (CDCR) proposes to adopt Subsection 3379(a)(9) of the California Code of Regulations (CCR), Title 15, Division 3, governing inmate transfers, out of state.

On October 4, 2006, California Governor Arnold Schwarzenegger declared a state of emergency due to overcrowding in California's prison system and issued an emergency proclamation ordering the California Department of Corrections and Rehabilitation (CDCR) to effectuate immediately the voluntary transfers of California inmates to out-of-state contract correctional facilities and to transfer inmates without their consent if insufficient inmates volunteered. The Governor acted pursuant to his authority under the California Emergency Services Act, Government Code Section 8550 et seq. The state of emergency continues to exist today and the emergency proclamation has therefore not been terminated. The Governor's emergency proclamation has the full force and effect of state law until termination of the state of emergency under Government Code section 8567.

On May 3, 2007, Assembly Bill 900 amended Penal Code section 11191 to delete language requiring all inmates' consent prior to a transfer to an out of state facility via the program set up following the Governor's emergency proclamation. The statutory amendment permitted such transfers to occur until at least 2011. The Governor's emergency proclamation continues in effect today, negating the immediate need for regulations so long as CDCR transfers inmates in the categories permitted under the Governor's emergency proclamation. However, CDCR may soon be forced to transfer inmates other than those in the categories listed in the emergency proclamation in order to alleviate the continued overcrowding emergency. Also, if the state of emergency is ended, the Governor's directives no longer have the force and effect of state law. Because the amendment to Penal Code section 11191 did not provide criteria for determining which inmates should be transferred, regulations will be necessary in the event the emergency proclamation ends.

The facts supporting the Governor's 2006 emergency proclamation and state of emergency continue to exist today. The extreme peril to the safety of persons and property and the magnitude of the circumstances exceed the capabilities of the services, personnel, equipment, and facilities of any geographical areas in this state. Overcrowding significantly impacts the CDCR's ability to appropriately house inmates directly from the local jail facilities. The overcrowding in the CDCR has also negatively affected programs and rehabilitative services provided to inmates housed under its jurisdiction.

The severe overcrowding continues to pose substantial risk to the safety of the men and women who work inside these institutions and the inmates housed in them. The substantial risk of violence, greater difficulty controlling large inmate populations, possible transmission of infectious illnesses, and the limited space for inmate living conditions which obstructs the view of correctional staff continue to maintain an environment with enormous security risks for CDCR staff, inmates, and the public. Overcrowding leads to inmate unrest and misconduct, causes harm to people and property, reduces and eliminates programs, and frustrates rehabilitation efforts.

The severe overcrowding has also strained the electrical and sewer systems that have to operate at maximum capacity. Operating at a constant maximum capacity poses a substantial health and safety risk to the CDCR staff, inmates and the public. Overloading the prison sewage and water systems has resulted in increased damage to state and private property which have resulted in multiple fines,

penalties and/or notices of violations to the CDCR related wastewater/sewer system overloading groundwater contamination and environmental pollution.

These proposed emergency regulations are necessary for the immediate preservation of the peace, health, and safety of the general public. The total inmate population at this time continues to exceed 170,000 inmates, as it did at the time of the Governor's emergency proclamation. Some 14,000 inmates are still housed in gymnasiums, dayrooms, and program rooms that were never designed to serve as inmate housing and therefore pose a significant safety risk. Inmates continue to be triple-bunked in these housing locations. To alleviate this situation, the CDCR proposes to amend Section 3379, Inmate Transfers, by adding new text that will establish and include California Out of State Facility (COCF) transfers.

Subsection 3000 is amended to alphabetically merge added definition with those that exist in the regulations. This is necessary in order to clarify what the out-of-state facility program is.

New Subsection 3375(g)(6) is adopted to specify that a classification review on inmates eligibility for transfer to a COCF program shall include the inmate's attorney consultation and conviction history in addition to case factors listed in 3375(g)(5). The attorney consultation ensures that inmates understand their rights in the process while the conviction history is necessary because some states in which COCF facilities are located have laws barring out-of-state inmates with certain convictions being housed in private prisons in those states.

New Subsection 3376.1(d)(5) is amended to establish that inmates subject to a COCF transfer shall not require a Departmental Review Board (DRB) review to avoid significant administrative delays in transferring inmates to COCF facilities and thereby helps mitigate the severe overcrowding emergency.

Existing Subsections 3379(a)(1) through (a)(8) are unchanged.

New Subsections 3379(a)(9) through 3379(a)(9)(I) are adopted to establish rules governing the transfer of CDCR inmates to COCFs as well as the basic fundamental rights and due process to be afforded to an inmate while housed in a COCF. New language shall also establish and clarify the ability of staff to comply with the CDCR objective of housing inmates in the least restrictive security level commensurate with an inmate's need for supervision while at the same time address the security needs of those inmates who are transferred to and housed in a COCF. Additionally, language is adopted to establish clearly defined criteria, due process, and a priority transfer order as outlined in Assembly Bill 900 and the Governor's State of Emergency Proclamation for prison overcrowding. A clear, consistent correctional standard is critical to statewide enforcement in order to eliminate the risk of arbitrary or capricious interpretation and promote appropriate placement of inmates. Specifically, the adopted new Subsections establish the following:

Subsection 3379(a)(9) includes language to establish the basic eligibility and transfer review process of all male California inmates for transfer to a COCF. This is necessary in order to establish and clarify to staff which inmates are eligible and shall be reviewed for a COCF transfer.

Subsection 3379(a)(9)(A) establishes the criteria for inmate eligibility for transfer to COCF. This is necessary in order to comply with CDCR's due process obligation. These criteria provide the structure necessary to avoid arbitrary decisions and promote consistency in decision-making by CDCR. It also

provides notice to inmates of the eligibility criteria sufficient for them to determine whether they may be subject to transfer.

Subsection 3379(a)(9)(B) establishes the criteria for an inmate's ineligibility for transfer to COCF. This is necessary in order to comply with CDCR's due process obligation. It provides the structure necessary to avoid arbitrary decisions and promotes consistency in decision-making by CDCR. It also provides notice to inmates of the eligibility criteria sufficient for them to determine whether they may be subject to transfer.

Subsection 3379(a)(9)(C) establishes the right for an inmate who volunteers for a COCF transfer, or upon notification of transfer eligibility, to seek a legal consultation with an attorney prior to a classification committee hearing. This is necessary because an inmate must have informed consent to the transfer, meaning the inmate must understand his rights in the process and decide whether to volunteer without undue influence. Additionally, this is necessary because Penal Code section 11191 requires that inmates be provided with the opportunity to consult with an attorney of their choice prior to transfer.

Subsection 3379(a)(9)(D) establishes documentation requirements for the notification of transfer eligibility, notification of opportunity for attorney consultation, and interpreter needs for the attorney consultation. This ensures a standardized process by which any inmate eligible for a COCF transfer, voluntarily or involuntarily, are afforded their right as outlined in Penal Code section 11191. Contract attorneys provide their own interpreter services in the event a language other than English is required for the attorney consultation. The inmate shall be accommodated with an appropriate language interpreter who is not a CDCR employee thereby maintaining attorney – client privilege. Documentation ensures this entitlement is uniformly and consistently applied.

Subsection 3379(a)(9)(E) establishes documentation requirements for the attorney consultation or waiver of such consultation by the inmate. This is necessary in order to ensure that the attorney consultation or the waiver of such consultation has been completed in accordance with Penal Code section 11191.

Subsection 3379(a)(9)(F) establishes that an inmate who meets the eligibility criteria may volunteer for transfer to a COCF. Additionally, language is included which requires an inmate who volunteers for a COCF transfer, to sign an Out Of State Placement Agreement. The agreement is necessary to document that the inmate's consent was knowing, intelligent and voluntary. Inmates who volunteer for a COCF transfer may waive their right to the attorney consultation by signing an attorney waiver statement. It is required for an inmate to sign the attorney waiver statement in order to document the inmates notice and voluntary waiver to seek legal counsel. Inmates eligible for COCF are not subject to signing a CDC Form 294 (Rev. 6/96), Interstate Compact Placement Agreement, as that agreement applies only to inmates transferred to facilities operated by other states or the federal government under the Interstate Correctional Compact or Western Interstate Corrections Compact. COCF inmates are not transferred under either of these compacts. COCF transfers are applicable to California inmates only.

Subsection 3379(a)(9)(G) establishes that inmates who participate in the Mental Health Services Delivery System at a level of Enhanced Out Patient or higher are not eligible for involuntary transfer to COCF. This is necessary due to the need for continuous medical care and supervision for these designations as deemed by the Coleman lawsuit and the Health Care Services Division.

Subsection 3379(a)(9)(H) includes language to establish priorities for involuntary transfers. The purpose of these transfer priorities is to establish the Governor's priorities as specified in his emergency proclamation as well as define priorities set by the Secretary as permitted by the Governor's emergency proclamation. The priorities are designed to cause the least impact on inmates with strong ties to California and who are expected to reintegrate into California society upon leaving prison.

Subsection 3379(a)(9)(I) establishes that inmates transferred to a COCF remain under the legal custody of the CDCR and shall be subject to the rules, rights and privileges in accordance with the California Code of Regulations (CCR), Division 3, Title 15. This is necessary in order to clarify that COCF inmates are subject to the same rules and regulations as any CDCR inmate housed in a CDCR facility.

Existing Subsections 3379(b) through (d)(4) are unchanged.

The Department, in proposing adoption of these regulations, has identified and relied upon the Governor's emergency proclamation of October 4, 2006.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

The Department has made an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

The Department must determine that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective, and less burdensome to affected private persons than the action proposed.

CERTIFICATION OF OPERATIONAL NECESSITY
[Per Penal Code Section 5058.3]

This action adopts provisions governing Inmate Transfers, specifically transfers to a California Out-of-State Correctional Facility (COCF). On October 4, 2006, California Governor Arnold Schwarzenegger declared a state of emergency due to overcrowding in California's prison system and issued an emergency proclamation pursuant to his authority under the California Emergency Services Act, Government Code section 8550 et seq., ordering the California Department of Corrections and Rehabilitation (CDCR) to effectuate immediately the voluntary transfers of California inmates to out-of-state contract correctional facilities and to transfer inmates without their consent if insufficient inmates volunteered. The extreme peril to the safety of persons and property and the magnitude of the circumstances exceed the capabilities of the services, personnel, equipment, and facilities of any geographical areas in this state. The overcrowding significantly impacts the CDCR's ability to appropriately house inmates directly from the local jail facilities. The emergency proclamation further emphasized the overcrowding in the CDCR has negatively affected programs and rehabilitative services provided to inmates housed under its jurisdiction. The state of emergency continues to exist today and the emergency proclamation has therefore not been terminated. The Governor's emergency proclamation has the full force and effect of state law until termination of the state of emergency under Government Code section 8567.

It is necessary to file these regulations on an Operational Necessity basis under Penal Code section 5058.3 to ensure that these provisions provide the appropriate authority and direction for the review and approval for placement of an inmate into a California Out-of-State Correctional Facility.

I, Brett H. Morgan, Chief of Staff, Department of Corrections and Rehabilitation, certify that the operational needs of the Department require the proposed adoption of the California Code of Regulations, Title 15, Section 3379, subsection (a)(9), Inmate Transfers, pursuant to Penal Code section 5058.3.


BRETT H. MORGAN

Chief of Staff
Department of Corrections and Rehabilitation

10/9/08
Date